

**UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION**

Mirant Delta, LLC and)	
Mirant Potrero, LLC,)	
Complainants,)	
v.	)	Docket No. EL01-35-000
)	
California Independent System)	
Operator Corporation,)	
Respondent.)	
)	
San Diego Gas & Electric Company,)	
Complainant,)	
v.	)	Docket No. EL00-95-005
	)	Docket No. EL00-95-012
Sellers of Ancillary Services)	
Into Markets Operated by the California)	
Independent System Operator and the)	
California Power Exchange,)	
Respondents, <i>et al.</i>)	
)	
California Independent System	)	Docket No. ER01-1877-000
Operator Corporation	)	Docket No. EL00-95-030
	)	Docket No. EL00-98-029
)	
Operational Audit of the)	
California Independent System Operator	)	Docket No. PA02-1-000
)	
California Independent System	)	Docket No. RT01-85-000
)	
Pacific Gas and Electric Company	)	Docket No. RT01-83-000
)	
)	
San Diego Gas & Electric Company	)	Docket No. RT01-82-000
)	
Southern California Edison Company	)	Docket No. RT01-92-000
)	

**REQUEST FOR REHEARING AND MOTION FOR STAY OF THE
CALIFORNIA ELECTRICITY OVERSIGHT BOARD
OF THE JULY 17, 2002 ORDER**

Pursuant to Section 313(a) of the Federal Power Act, 16 U.S.C. § 251(a) and Rules 212 and 713 of the Commission's Rules of Practice and Procedure, 18 C.F.R. §§ 385.212 and 385.713, the California Electricity Oversight Board (CEOB) hereby requests rehearing and a stay of the Commission's July 17, 2002 *Order Concerning Governance of the California Independent System Operator Corporation*, 100 FERC ¶ 61,059 (2002) (July 17 Order).

I. INTRODUCTION AND SUMMARY

In its July 17, 2002 Order, the Commission once again addresses the issue of the governance of the California Independent System Operator (CAISO). Specifically, the Commission orders that the board of governors, appointed by the Governor of the State of California under state law, be ousted and replaced by an "independent" board and two advisory bodies, one consisting of industry stakeholders and the other consisting of the CEOB, which would represent the interests of the State of California. As a California nonprofit public benefit corporation, the CAISO's corporate governance structure is a matter of state law whether or not CAISO is a "public utility" under Section 201 of the Federal Power Act (FPA). The Commission has no statutory authority under the FPA to oust a public utility's board of directors or to substitute a corporate governance structure different from and inconsistent with that specified under the law of the state in which the public utility is incorporated. Moreover, unlike traditional public utilities, the CAISO's governance is expressly prescribed by statute in a manner determined by the State to be necessary to protect public health, safety and welfare.

The foregoing is true whether or not the CAISO is a public utility subject to the Commission's jurisdiction just like any other public utility. However, if it is as the

Commission asserts that the CAISO is controlled by the State of California, then the CAISO is an “instrumentality” of the State under Section 201(f) of the FPA and, therefore, not a public utility subject to the Commission’s jurisdiction. To the extent this is so, the CAISO is a nonpublic utility, leaving the Commission no authority over the governance of the CAISO.

In addition, assuming the CAISO is a public utility, the Commission’s statutory authority under Section 205 and 206 of the FPA is limited to rates and terms and conditions of service. The CAISO’s corporate structure, including the Articles of Incorporation and corporate bylaws that reflect this structure, are not rates, terms or conditions of service and do not determine such matters. Further, even assuming that a Section 205 or 206 proceeding could consider the relationship between terms of service and corporate structure, the Commission may not reject a rate filing or fix a rate found to be unjust and unreasonable in the absence of a full hearing and based on substantial evidence. The Commission has never held a hearing on the CAISO’s governance and there is no substantial evidence on the record justifying the Commission’s decision. In fact, the Commission relies primarily on two reports, one prepared by the General Accounting Office (GAO), the other, the Operational Audit of the CAISO prepared at the Commission’s initiative in Docket No.PA02-1-000. Neither of these reports are a part of the record in this proceeding. None of the persons or entities that provided information to the authors of the report was subject to due process checks of discovery and cross-examination. In addition, the reports do not substantiate any unfair charges or undue discrimination in service on the part of the CAISO. Rather, the reports appear to

memorialize market participants' claimed perception that the CAISO lacks sufficient independence.

Finally, if corporate governance was subject to the Commission's jurisdiction, and there was substantial evidence of a violation of the FPA, the Commission's remedy in this case is so extreme as to render it arbitrary and capricious and an abuse of discretion.

The CEOB requests a stay of the July 17 Order in the event the Commission does not promptly grant this request for rehearing on the merits. If the CAISO were to comply with the Commission's order, it would be in violation of state law. In fact, without its existing board of governors, the CAISO would have no legal standing as a corporate entity and any action it would purport to take would be *ultra vires*. Given that the Commission has waited until now to issue this order, 18 months after the existing governing board came into being, there can be no immediate harm in staying this order until it becomes final.

II. REQUEST FOR REHEARING

A. BACKGROUND

As the Commission is aware, the CAISO is a California nonprofit public benefit corporation created by AB 1890,¹ California's original electric industry restructuring law. As originally enacted, AB 1890 included several requirements related to corporate governance—then a stakeholder governing board—to which the Commission took exception. These include: (1) that the CAISO would be administered by boards of directors appointed by the CEOB; (2) that members of the CAISO board could appeal CAISO governing board actions to the CEOB; and (3) that the appointees to the CAISO board have or establish residency in the State.²

The jurisdictional dispute concerning the original stakeholder governance structure became the subject of review in the Court of Appeals for the District of Columbia Circuit. The review of this jurisdictional question was suspended by a settlement between the State and the Commission that included the enactment of modified language concerning the governance of the CAISO. That settlement was reflected in California Senate Bill (SB) 96 and includes Section 337 of the California Public Utilities Code, which provides in pertinent part:

The structural composition of the California Independent System Operator governing board existing on July 1, 1999, shall remain in effect until an agreement with a participating state is legally in effect. However, prior to such an agreement, California shall retain the right to change the

¹ Codified at Cal. Pub. Util. Code §§ 330-397.

² In its Phase I order of November 26, 1996, the Commission conditionally approved the operational transfer of transmission assets to an independent system operator but “disapproved” elements of the California enactment, including the provisions mentioned above that conditioned the corporate structure and scope of corporate authority that was authorized under state law. *Pacific Gas & Elec. Co.*, 77 FERC ¶ 61,204 at 61,818 (1996).

Independent System Operator governing board into a nonstakeholder board. In the event of such a legislative change, revised bylaws shall be filed with the Federal Energy Regulatory Commission under Section 205 of the Federal Power Act (16 U.S.C.A. Sec. 824d) [emphasis added].

On July 7, 1999, the CEOB filed a Petition for Declaratory Order, EL99-75-000, requesting that the Commission find the amendment of California law proposed in SB 96 would resolve the then pending jurisdictional disputes. On August 5, 1999, in *California Electricity Oversight Board*, 88 FERC ¶ 62,172, the Commission granted the CEOB's petition thereby approving the governance provisions, including amended section 337 set forth in SB 96.

By fall 2000, however, as the electricity crisis was brewing, it became clear to the Commission and the State of California that the CAISO's stakeholder governing board could no longer serve the public interest. In its November 1, 2000 order proposing remedies to address "dysfunctions" in California's wholesale bulk power markets, the Commission proposed that the CAISO's stakeholder board be replaced with a non-stakeholder board in a manner dictated entirely by the Commission, *San Diego Gas & Electric Co.*, 93 FERC ¶ 61,121 (2000) (November 1 Order), *order on reh'g*, 97 FERC ¶ 61,275 (2001); *reh'g denied*, 99 FERC ¶ 61,160. The CEOB, in its Comments and Request for Rehearing of the November 1 Order agreed that the stakeholder board needed to be replaced but pointed out that corporate governance structure of the CAISO was a matter purely of state law and, moreover, that the State had expressly reserved the right under SB 96 to enact state law to change the stakeholder board into a nonstakeholder Board and that the Commission conceded the State's right to do so.

In its December 15 Order, the Commission ordered that the CAISO replace its stakeholder board with a non-stakeholder board. *San Diego Gas & Electric Co.*, 93

FERC ¶ 61,294 (2000) (December 15 Order), *order on reh'g*, 97 FERC ¶ 61,275, 62,013 (2001), *reh'g denied*, 99 FERC ¶ 61,160 (2002). Specifically, the December 15 Order directed the then-existing board to turn over decision making and operational control to CAISO management by January 29, 2001. *Id.* at 62,013-14. The Commission further found the CAISO corporate bylaws to be inconsistent with the December 15 Order stated that they would become null and void as of January 29, 2001. *Id.* at 62,014. Although the Commission called for further discussions with California officials concerning how a new independent board would be selected, the December 15 Order, like the November 1 Order, barred the State from any formal role in the appointment of CAISO governing board. *Id.* at 62,013.

As the CEOB pointed out in its Request for Rehearing of the December 15 Order:

In this respect, the December 15 Order impermissibly intrudes upon state law. The CAISO and CalPX are California nonprofit public benefit corporations expressly created by state law. A state does not require the approval of the federal government to enact, repeal or amend its statutes

Notwithstanding the November 1 and December 15 Orders, on January 18, 2001, the State of California enacted legislation to replace the CAISO's stakeholder board. Assembly Bill (AB) 5X replaced the stakeholder board with a five-member, non-stakeholder board appointed by the Governor, subject to confirmation by the CEOB. By January 25, 2001, the new nonstakeholder governing board appointed by Governor Davis was in place.³

The Commission's most recent salvo on this topic, the July 17 Order, rejected the CAISO's AB 5X conforming bylaws and agreed with complainants Mirant Delta, LLC and Mirant Potrero, LLC, in Docket No. EL01-35-000 that the CAISO's governance

³ A Subsequent bill, SB 47, which was enacted into law, provides for three-year staggered terms and subjects CAISO governing board members to confirmation by the State Senate.

structure, as reflected in its bylaws, was inconsistent with the December 15 Order. In addition, the July 17 Order found that existing CAISO governing board was “not sufficiently independent” to operate the CAISO’s transmission grid in a non-discriminatory manner (July 17 Order at ¶ 49), and directed that the current board be replaced with an “independent, non-stakeholder board” of nine members by January 1, 2003, *id.* at ¶ 62. The Commission further directed that a consultant identify a slate of possible candidates for membership to the new governing board and that a new committee of stakeholders select the nine new board members from this slate. *Id.* at ¶¶ 62-63. The Commission expressly excluded officers and representatives of the State of California from participating in that process, accept that the CEOB would serve as an advisory committee. *Id.* at ¶¶ 2, 68. The Commission directed the CAISO to take certain actions and submit certain documents by August 15, August 30, and September 13, 2002.⁴

B. SPECIFICATION OF ERROR

The CEOB specifies the following errors:

1. The Commission has no statutory authority to change the corporate governance structure of the CAISO to the extent that the CAISO is a “public utility” incorporated under the laws of the State of California.

⁴ The July 17 Order requires the CAISO to file a list of the six member-classes and the stakeholders within each class by August 15, 2002; a list of the names and affiliations of each of the six representatives from the six member-classes by August 30, 2002; and a document identifying the executive search firm that the Board Selection Committee has chosen by September 13, 2002. July 17 Order at ¶¶ 62-63.

2. The Commission has no jurisdiction over the CAISO to the extent that the CAISO is an “instrumentality” of the State of California.
3. The CAISO’s corporate structure and bylaws are not a rate or term or condition within the meaning of Section 205 or 206 of the FPA and, therefore, Commission has no statutory authority to direct changes to the CAISO’s corporate structure or bylaws in a Section 205 or 206 proceeding.
4. The Commission has no statutory authority to reject a rate filing under Section 205 or to fix a rate, term or condition under Section 206, in the absence of substantial evidence on the record adduced in an evidentiary hearing.
5. To the extent the Commission found any discriminatory practice by the CAISO, the Commission’s proposed ouster of the CAISO’s existing governing board and proposed new governance structure is an extreme and unnecessary remedy and is therefore arbitrary and capricious and an abuse of discretion.

C. ARGUMENT

- 1. The Commission has no statutory authority to change the corporate governance structure of the CAISO, a public utility incorporated under the laws of the State of California.**

All corporations whose activities make them public utilities subject to the Commission’s jurisdiction are first, and foremost, purely creatures of state law. The

CAISO, like other corporate entities such as Pacific Gas and Electric Company (PG&E) or Southern California Edison Company (SCE), exist as legal entities only because they are incorporated under and subject to the corporation laws of a state. Moreover, unlike other public utilities, the CAISO was expressly created by the State of California as a state-chartered nonprofit public benefit corporation under California Corporations Code⁵ to control the statewide transmission grid and ensure efficient use and reliable operation of the transmission system pursuant to California's electric industry restructuring law. Cal Pub. Util. Code § 345.

The provisions of the California Corporations Code that set forth the corporate structure of a California nonprofit public benefit corporation specifies that corporate documents, which must conform to State law, must be filed with the Secretary of State. Cal. Corp. Code § 5008. The State of California (through the CEOB) incorporated the CAISO and filed Articles of Incorporation with the California Secretary of State in 1997 and CAISO continues to conform to all requirements of the corporate law of the State of California.

The Commission is a federal administrative agency and its authority is limited to what has been delegated to it by Congress in the FPA. As the Court of Appeals of the District of Columbia Circuit has so recently reminded the Commission:

FERC is a "creature of statute," having "no constitutional or common law existence or authority, but only those authorities conferred upon it by Congress." Thus, if there is no statutory grant of authority, FERC has none.

⁵ Nonprofit Corporations Law, Public Benefit Corporations. Cal. Corp. Code Section 5000 et seq.

Atlantic City Electric Co, 295 F.3d 1, 7 (D.C. Cir. 2002) (citations omitted). The Commission has no statutory authority under the FPA to affect the corporate structure of a public utility generally, or the CAISO specifically.

First, there is no express authority under the FPA that would allow the Commission to interfere with the corporate governance of a public utility. The only provision of the FPA that relates in any way to the governance of a public utility is Section 305 of the FPA. 16 U.S.C. § 825f. Under Section 305(a), officers and directors of a public utility are prohibited from benefiting in any way from the sale of any security or to share in the proceeds of any dividend. Section 305(b) precludes a director of a public utility from holding more than one directorship in a public utility or from holding both a directorship in a public utility and certain other entities, such as a bank or trust company. Section 305(c) requires officers and directors of public utilities to file annual statements disclosing their positions.

Nothing about the CAISO's existing board of governors violates Section 305. No provision of the FPA provides the Commission with the statutory authority to undertake the very extraordinary action of ousting a board of directors of a public utility and the even more extraordinary action of imposing an entirely new governing structure that would entirely displace provisions of California's law that were enacted to protect the health, safety and welfare of the State's citizens. Indeed, it is difficult to imagine that the Commission itself could believe that it had the statutory authority to oust the existing board of directors of PG&E or SCE and also to dictate an entirely new governance structure for these two familiar public utilities, which are also corporations under the law of the State of California.

Second, Congress carefully limited the Commission's statutory authority only to those matters that could not be regulated by the states. Thus, unless the FPA expressly empowers the Commission to act in an area otherwise regulated by a state, the presumption is that Congress intended to leave all such areas to the states. Section 201(a) of the FPA provides:

It is hereby declared that the business of transmitting and selling electric energy for ultimate distribution to the public is affected with a public interest, and that Federal regulation of matters relating to generation to the extent provided in this Part and the Part next following and of that part of such business which consists of the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce is necessary in the public interest, *such Federal regulation, however, to extend only to those matters which are not subject to regulation by the States.* [16 U.S.C. § 824(a) (emphasis added).]

The affect of this “savings clause” was discussed by the Court of Appeals for the Ninth Circuit:

Congress intended to permit the states to carry on any and all activities in which they were lawfully engaged at the time of the passage of the act. If any of the state activities were unlawful at the time, either because they were in violation of some federal statute or in violation of the Constitution, the Act did not purport to make them lawful. Thus, the Federal Power Act preserved lawful state regulations and exempted them from preemption under that particular Act.

Shamrock Farms Co. v. Veneman, 146 F.3d 1177, 1181 (9th Cir. 1998). Matters of corporate law, including the governance structure of corporations, are “lawful state regulations” (*Id.*) and clearly “subject to regulation by the States” (FPA 201(a)).

Accordingly, the Commission's attempt to out the CAISO's governing board and to displace and rewrite California law is beyond its statutory authority.

2. The Commission has no jurisdiction over the CAISO to the extent that it is an “instrumentality” of the State of California.

The provisions of the FPA exempt several entities from the Commission's jurisdiction. Section 201(f) provides:

No provision in this Part shall apply to, or be deemed to include, the United States, a State or any political subdivision of a state, or any agency, authority, or *instrumentality* of any one or more of the foregoing, or any corporation which is wholly owned, directly or indirectly, by any one or more of the foregoing, or any officer, agent, employee or any of the foregoing acting as such in the course of his official duty, unless such provision makes specific reference thereto. [Emphasis added.]

If the Commission believes that the CAISO is “controlled by” the State of California (July 17 Order at ¶ 42), then it must conclude that the CAISO is an “instrumentality” of the State of California and, therefore, generally exempt from jurisdiction under Part II of the FPA. If the CAISO is an instrumentality of the State of California, then the Commission is divested of jurisdiction over it.

3. The CAISO's corporate structure and bylaws are not a rate or term or condition within the meaning of Section 205 or 206 of the FPA and, therefore, Commission has no statutory authority to direct changes to the CAISO's corporate structure or bylaws in a Section 205 or 206 proceeding.

a.) Section 205

Section 205(a) of the FPA provides that:

All rates and charges made, demanded, or received by any public utility for or in connection with the transmission or sale of electric energy subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

Section 205(c) requires a public utility to file any such rates and charges with the Commission. A public utility's bylaws and its corporate structure, in general, cannot reasonably be considered “rates” or “charges,” or “rules” or “regulations affecting or

pertaining to such rates or charges . . .” and the Commission has no authority to require a public utility to file its bylaws. *Atlantic City* makes it clear that the Commission does not have statutory authority over every facet of an independent system operator (ISO) or a regional transmission organization (RTO).

In 1996, Pennsylvania-New Jersey-Maryland (PJM) Interconnection filed its open access tariff and several negotiated agreements that proposed to revise the PJM governance structure to become an ISO within the meeting of Order 888. As with filings related to the CAISO’s formation, the Commission asserted jurisdiction over the PJM restructuring under Section 203, concluding that the proposal to transfer operational responsibilities to an ISO is a “disposition of jurisdictional facilities” within the meaning of Section 203, requiring Commission authorization.

One of the original features of the PJM proposal, as filed, allowed utilities to withdraw from the PJM-ISO upon 90 days’ notice. The Commission rejected this provision and directed PJM to modify the tariff to allow withdrawal only upon the Commission’s approval. On review, the Court of Appeals for the District of Columbia Circuit found that section 203 pertained to the “sale or lease of assets,” not to a change in operational control, such as joining or withdrawing from an ISO. “Therefore, FERC exceeded its jurisdiction by directing the utility petitioners to modify their agreement to state that any notice of withdrawal from the ISO shall become effective only upon FERC approval.” *Atlantic City* at 6

The CAISO’s bylaws were filed at the behest of the Commission⁶ in the context of California’s traditional investor-owned utilities’ Section 203 application to transfer

⁶ The CAISO has always styled its filings of its bylaws as an “informational” filing rather than a mandatory filing of a rate or charge under Section 205.

operational control of their transmission facilities to the CAISO. Thus, the Court of Appeals has struck down the legal basis for the Commission's requirement that the CAISO's bylaws be filed with the Commission in the first place.

Atlantic City also undermines the legal basis for the Commission's treatment of the bylaws as part of the CAISO's tariff required to be on file with the Commission under Section 205 tariff. With no legal basis for requiring bylaws to be filed with the Commission, the Commission has no authority to require the CAISO to alter and amend bylaws under Section 205. Moreover, the Court of Appeals found that Order 888, (and, implication, Order 2000), does not alter a public utility's rights under Section 205 even if that public utility is an ISO, such as the CAISO.

The Court concluded that:

Order No. 888 is merely a regulation. It cannot be the basis for denying the petitioners their rights provided by a statute enacted by both houses of Congress and signed into law by the president. While there may be some ambiguity in how to treat an ISO under section 205, such "ambiguity is not evidence of congressional delegation of authority" to set aside the utility petitioners' statutory rights under section 205. [*Id.* at 8.]

Finally, *Atlantic City* observed that the Commission's attempt to assert jurisdiction over the structure of ISOs represented a departure from its treatment of tight power pools. After finding that the Commission's interpretation of Section 203 could not be reconciled with Section 202, which makes clear Congress' intent to leave coordination among utilities as a purely voluntary matter, the Court noted that in the many years prior to the formation of ISOs, the Commission had never used Section 203 with respect to public utilities' voluntary formation of tight power pools. Similarly, in its oversight of traditional public utilities, the Commission has never considered corporate bylaws to be part of a utility's tariff required to be filed under Section 205. The Commission's attempt

to assert plenary jurisdiction over all features of an ISO or RTO is another example of the Commission's overreaching.

b.) Section 206

The scope of the Commission's authority under Section 206 is similarly to that set forth in Section 205. Under Section 206, the Commission, upon complaint or on its own motion, may "determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order."

In the July 17, 2002 Order, the Commission held that:

FPA section 206 provides the Commission with authority to fix a just and reasonable rate (or rule or practice affecting a rate) whenever it determines, after hearing, that an existing rate (or rule or practice affecting a rate) is unjust, unreasonable, unduly discriminatory, or preferential. The CAISO's bylaws and the governance provisions contained in them affect the rates, terms, and conditions of jurisdictional services and are on file with the Commission and, thus, are subject to our review under section 206. [July 17 Order at ¶ 70.]

As stated above, the composition of a public utility's board of directors is not a rate, term or condition of service. The Order makes a tenuous link to rates terms and conditions without any clear support for the premise. By this same logic, the Commission could find that practically everything related to a public utility is within the Commission's jurisdiction, because anything could "affect" a rate, charge, classification, rule, regulation, practice, or contract. This expansive reading of its statutory authority cannot be reconciled with the limited scope of the FPA as set forth in Section 201(a), which expressly preserves state law.

The Commission's proper focus in a Section 206 proceeding, are the terms and conditions of a public utility's jurisdictional services. In the case of the CAISO, the

Commission's authority extends to terms and conditions of transmission service and prices, terms and conditions relating to the operations of the CAISO's wholesale electricity and ancillary services markets. If the prices, terms and conditions, are not found to be unjust and unreasonable or discriminatory, then the public utility is not in violation of the FPA the Commission has no basis for taking any action against the public utility. If a price, term or condition is found to be unjust or unreasonable or discriminatory, then the Commission has the authority, and the obligation, to set an appropriate rate, term or condition.

4. The Commission has no statutory authority to reject a rate filing under Section 205 or to fix a rate, term or condition under Section 206, in the absence of substantial evidence on the record adduced in an evidentiary hearing.

In its July 17 Order, the Commission found that the CAISO governing board did not meet the Commission's "independence" requirement prescribed for ISOs and RTOs in Order 888 and Order 2000. July 17 Order at ¶¶ 49, 56 – 57. The Commission made this finding without benefit of an evidentiary hearing and without substantial evidence in the record, in violation of Sections 205(e) and 206(a) of the FPA. Not only is a hearing required by the FPA, due process mandates a hearing under circumstances involving an essentially factual dispute over the CAISO's independence and in light of the significant jurisdictional dispute at issue.

Even disregarding the fact that the governance structure is not a rate or term, there is no substantial evidence on the record to support a finding that the CAISO cannot provide non-discriminatory service or that complainants have suffered such harm. The July 17 Order relies primarily on two reports, the GAO Report and the CAISO Audit Report.

These reports are, of course, hearsay. None of the participants offered direct testimony and no one has been cross-examined and the Commission has never allowed the parties to engage in discovery in these proceedings. Moreover, even assuming the truth of the matters asserted in the reports, they do not substantiate any lack of independence on the part of the CAISO, or any unjust, unreasonable, or discriminatory rate, term or condition that could trace back to the CAISO's governance structure. Rather, the reports appear to simply to memorialize the statements of some market participants that they consider the CAISO to lack sufficient independence. These materials fall far short of substantial evidence of an unjust rate, term or condition, or any actual discriminatory practices.

5. The Commission's proposed ouster of the CAISO's governing board and proposed new governance structure is an extreme and unnecessary remedy not required by any proven harm and is, therefore, arbitrary and capricious and an abuse of discretion.

Even if the Commission had statutory authority to consider corporate governance in the context of a complaint regarding discriminatory service, and even if the Commission had found discrimination in service after hearing and based on substantial evidence, the Commission's proposed remedy is so extreme—ouster of the existing board and mandated violation of state law enacted to protect public health safety and welfare—as to be arbitrary and capricious and an abuse of discretion. As noted above, in the event it finds that a rate, term or condition is unjust or unreasonable, or that a public utility has, or is, engaging in discriminatory conduct, the Commission has the authority and the obligation to “fix” a just rate, term or condition. The Commission's remedial action has, historically, and properly, been focused on exactly that: fixing the rate, term or condition themselves. The Commission has not taken action against the decision making body of

the corporate entity charging the allegedly unjust or unreasonable rate or allegedly engaging in discriminatory conduct. Similarly, if the Commission were to find that, based on substantial evidence, the CAISO had engaged in discriminatory conduct, the Commission's remedy should be focused on redressing the conduct, not in changing the corporate governance structure of the public utility.

III. REQUEST FOR STAY PENDING REHEARING

If the Commission's July 17 Order is not stayed pending rehearing on the merits, the CAISO will be in violation of either the July 17 Order or state law. As the agency of the State of California charged with oversight responsibility of the CAISO, the CEGB must insist that the CAISO comply with state law. The facts and circumstances clearly justify a stay in this proceeding to maintain the status quo pending orderly resolution of the issue.

A. STANDARD FOR STAY

In evaluating requests for a stay, the Commission applies the standard for set forth in Section 705 of Title 5, of the United States Code. Under Section 705, an agency will grant a stay where "justice so requires." In applying that standard, the Commission will evaluate whether (1) the moving party will suffer irreparable injury absent a stay; (2) issuance of a stay would substantially harm other parties; and (3) issuance of a stay is in the public interest. See *e.g., City of Tacoma*, 85 FERC ¶ 61,130 (1998). All elements of this standard are easily satisfied in this case.

B. A STAY IS REQUIRED TO AVOID IRREPARABLE INJURY

The July 17 Order requires the CAISO to oust the existing board of governors selected in accordance with the specific requirements of California law, as set forth in AB 5X, and to replace it with a new governing board in violation of state law. As a state-

chartered nonprofit public benefit corporation, the CAISO cannot legally enact the Commission's directives. The Attorney General of California has stated that *any action* by the CAISO to comply with the July 17 Order would violate state law, and has pledged to enforce California law and take legal action. This potential for enforcement action, in itself, is a sufficient basis for a finding of irreparable injury. *See Union Pacific RR Co. v. City of Las Vegas*, 747 F. Supp. 1402 (D. Nev. 1989) (irreparable harm shown where party would be subject to enforcement action and fines or unwarranted interruptions of its business operations).

C. A STAY WILL NOT HARM OTHER PARTIES

While the CAISO will suffer severe and irreparable injury if a stay is denied, a stay will not harm other parties. CAISO has operated under its current governance structure for a year and a half. The Commission has not identified any reason in its July 17 Order to believe that immediate replacement of the existing board is necessary to prevent harm to others. In fact, the Commission's objectives are broader: the creation of multi-state RTOs. The Commission believes that the existing governing board is an impediment to the CAISO's joining a multi-state RTO.

D. THE PUBLIC INTEREST SUPPORTS THE ISSUANCE OF A STAY PENDING REHEARING

It is in the public interest to avoid the legal predicament that will be created, one way or the other, if the Commission does not stay its July 17 Order. The CAISO can continue to provide services and the Commission, the CAISO, the CEGB and other interested parties can apply their remaining resources to improving the functioning of the markets pending the Commission's reconsideration. Given the jurisdictional nature of the dispute and the inability of the CAISO to legally comply with the Commission's directives, the status quo should be maintained during the pendency of this rehearing.

IV. CONCLUSION

For the above stated reasons, the CEGB respectfully requests rehearing of the above matter and stay of the order pending resolution of this.

Dated: August 16, 2002

Respectfully submitted,

Erik N. Saltmarsh

Erik N. Saltmarsh, Chief Counsel
Sidney L. Mannheim, Senior Staff Counsel
California Electricity Oversight Board
770 L Street, Suite 1250
Sacramento, CA 95814
(916) 322-8601

CERTIFICATE OF SERVICE

I hereby certify that I have caused the foregoing document to be served upon each person designated on the official service lists compiled by the Secretary for these proceedings on or before August 16, 2002.

Dated at Sacramento, California, this 16th day of August 2002.

Larry Cook
California Electricity Oversight Board
770 L Street, Suite 1250
Sacramento, CA 95814
(916) 322-8601